FILED

98 1078 JAN 4 - 1999

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
October Term, 1998

Margie J. Phelps,
Petitioner

vs.

Michael Barbara
Carla J. Stovall and
John Bork

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Chris R. Davis
Counsel of Record
PHELPS-CHARTERED
1414 S.W. Topeka Blvd.
P.O. Box 1886
Topeka, Kansas 66601-1886
(785) 233-4162

28pp

Petitioner was found guilty of contempt in state court. As her sentence, petitioner was fined $500, ordered to pay half the costs of the contempt proceedings, removed from the underlying case as counsel and prohibited from practicing in the state judicial district until the fine and costs were paid. Immediately following the contempt finding, the state disciplinary administrator filed a disciplinary complaint against petitioner, and petitioner's employer, a state agency, proposed an unpaid suspension, both of which are pending. The judge who heard the contempt charge was also the accuser and alleged he was personally the victim. Petitioner sought his recusal, which was denied. On appeal, the Kansas Court of Appeals found it was improper for the judge to hear the matter, but upheld the contempt finding saying the judicial bias was harmless. After exhausting state remedies, petitioner sought relief through a habeas petition. The petition was dismissed on a finding that petitioner was not "in custody."

A. Is it a denial of equal protection to deny access to federal courts through habeas review for those persons whose constitutional rights have been violated, simply because they have not been imposed jail time, while those with jail time imposed are afforded full review of their constitutional issues?

B. Was it error for the federal courts to find that petitioner was not "in custody," given the significant restraints on her liberty, including her professional liberty?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents ii

Table of Cases & Authorities iii

Reference to Official Report of Opinion 1

Concise Statement of the Grounds on Which Jurisdiction of this Court is Invoked 1

Constitutional Provisions Involved in the Case 2

Where the Constitutional Issues Were Raised With the State (Lower) Courts 2

Concise Statement of the Case 3

Reasons the Writ Should Issue 9

A. It is a denial of equal protection to deny access to federal courts through habeas review for those persons whose constitutional rights have been violated, simply because they have not been imposed jail time, while those with jail time imposed are afforded full review of their constitutional issues 9

B. It was error for the federal courts to find that petitioner was not "in custody," given the significant restraints on her liberty, including her professional liberty 15

Conclusion 20

TABLE OF CASES & AUTHORITIES

Cases

Concise Statement of the Case

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 7

Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) 7

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 8

Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) 7

Mayberry v. Pennsylvania, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1974) 6

Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) 8

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) 8

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) 6, 7

Reasons the Writ Should Issue
Issue A - Equal Protection

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1997) 14

Jones v. United States, 419 U.S. 907, 95 S.Ct. 190, 42 L.Ed.2d 150 (1974) 10

Kauffman v. Secretary of the Air Force, 135 U.S.App.D.C. 1, 415 F.2d 991 (1969) 11

Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) 13

Meltzer v. C. Buck LeCraw & Company, 402 U.S. 936, 91 S.Ct. 1624, 29 L.Ed.2d 130 (1971) 10

Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973) 10

Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) 13

Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) 13

St. David's v. Westboro Baptist Church, 22 Kan.App.2d 537, 921 P.2d 821 (1996) 13

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984) 10

United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973) 10

Issue B - "In Custody"

Barry v. Bergen County Probation Department, 128 F.3d 152 (3d Cir. 1997) 16

Dow v. Circuit Court of the First Circuit, 995 F.2d 922 (9th Cir. 1993) 16

Duvallon v. Florida, 691 F.2d 483 (11th Cir. 1982) 15

Ginsberg v. Abrams, 702 F.2d 48 (2d Cir. 1983) 18

Ginsberg v. Purcell, 51 N.Y.2d 272, 414 N.E.2d 648, 434 N.Y.S.2d 147, *reversed*, 74 A.D.2d 561, 424 N.Y.S.2d 473 (1980) 18

Gornto v. McDougall, 336 F.Supp. 1372 (S.D.Ga. 1972) . . 16

In the Matter of Ginsberg, 106 A.D.2d 421, 483 N.Y.S.2d 645 (1984) 18

Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1962) 15

Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982) 15

McClenny v. Murray, 33 F.3d 52, 1994 WL 465851 (4th Cir. (Va., 1994)) 17

Richards v. Townsend, 300 F.Supp. 529 (N.D.Calif. 1969) . 16

Russell v. City of Pierre, State of South Dakota, 530 F.2d 791 (8th Cir. 1976) 15

Williamson v. Gregoire, 151 F.3d 1180 (9th Cir. 1998) . 15, 17

Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976) 15

Authorities

Article III, Sections 1 and 2, United States Constitution 2

Article IV, Section 2, United States Constitution 2

Fifth Amendment, Section 4, United States Constitution 2

Fourteenth Amendment, Sections 1 and 5, United States Constitution 2

REFERENCE TO OFFICIAL REPORT OF OPINIONS

All of the opinions at issue here were unpublished, including state and federal court opinions.[1] The district court's order can be found at 1997 WL 756625 (D.Kan., 11/18/97).

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment or decree sought to be reviewed: The Tenth Circuit Court of Appeals' opinion was issued October 7, 1998.

B. Date of any order respecting a rehearing: Petitioner filed a timely petition for rehearing with suggestions for rehearing en banc, which was denied by the Tenth Circuit without comment on November 6, 1998.

C. Statutory provisions conferring on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: Rule 10(a), Rules of the Supreme Court of the United States, "a United States court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

1

The only parties to the proceeding at the lower court are reflected in the caption. Michael Barbara is the state court judge who heard the contempt charges. John Bork is the attorney general assigned by Judge Barbara to prosecute the contempt charges. Carla Stovall is the Kansas Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article III, Section 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . Section 2, Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . .

Article IV, Section 2, Clause 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Fifth Amendment to the United States Constitution, Section 4: .... No person shall . . . be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the United States Constitution, Section 1: .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WHERE THE CONSTITUTIONAL ISSUES WERE RAISED WITH THE STATE (LOWER) COURTS

Petitioner challenged Judge Barbara's ability to hear the contempt proceedings at the outset of the contempt hearing, in light of his allegation in the show cause order that he was personally the victim of contempt. Judge Barbara denied

petitioner's requests that he remove himself from hearing the matter.

Petitioner raised her constitutional right to an unbiased judge before the Kansas Court of Appeals. During the appeal, the State did not contend the judicial bias was harmless error, and instead claimed there was no bias and no impropriety in Judge Barbara hearing the matter. Therefore, the harmless error issue was not addressed before the Kansas Court of Appeals, in the initial briefs or arguments.

After the Kansas Court of Appeals agreed that Judge Barbara should not have heard the matter, but concluded it was harmless error for him to do so, petitioner raised the constitutional issue again with the Kansas Court of Appeals in a motion for rehearing, and with the Kansas Supreme Court in a petition for review. Both of those requests for review were denied without comment.

Petitioner raised the constitutional issue about judicial bias in her habeas petition. When the district court certified the jurisdiction issue for review by the Tenth Circuit, the constitutional issue regarding bias was also certified for review, and briefed by petitioner. The Tenth Circuit only addressed the "in custody" issue.

After the Tenth Circuit ruled that petitioner was not "in custody," petitioner raised an additional constitutional issue, equal protection, in a petition for rehearing with suggestions for rehearing en banc. That petition was denied without comment.

CONCISE STATEMENT OF THE CASE

Petitioner is counsel for Westboro Baptist Church in

Topeka, Kansas. Westboro Baptist Church is an Old School Baptist church engaged in anti-homosexual religious picketing. This highly controversial picketing focuses on the homosexual movement in America, as well as the role of various churches in that movement.

Westboro Baptist Church's activity has caused it to engage in public debate with many churches and religious leaders. The central message of Westboro Baptist Church's religious message is reflected in its webpage, "www.godhatesfags.com."

Petitioner represented Westboro Baptist Church in a lawsuit filed in state court in Topeka, Shawnee County, Kansas (where the church is located). The suit was filed on July 13, 1994, by St. David's Episcopal Church, and pertained to picketing and counter-picketing occurring between the two churches' members outside of St. David's church building. The case was assigned to Judge Barbara, a retired state court judge and professor at the local law school (Washburn University).

The year before the case was assigned to Judge Barbara, he and other law school professors included their names in a large ad run in the local paper which criticized Westboro Baptist Church's picketing and religious message. Other persons signing the petition included St. David's rector and attorney, and other members of that church. Concerns about Judge Barbara's ability to hear matters concerning the picketers, and in particular to hear the dispute between the two churches, were raised with Judge Barbara, but he declined to remove himself from cases involving the picketers, including the *St. David's* case.

Fred Phelps, Westboro Baptist Church's preacher, conducted a weekly radio sermon on a program called "Old School Baptist Hour." On August 14, 1994, as part of his sermon, Mr. Phelps briefly criticized Professor Michael Barbara for actions he believed were immoral. (The law school, and various of its

professors, were and are frequently the topic of preaching by Mr. Phelps, on and off the radio.)

On September 14, 1994, petitioner filed a motion asking Judge Barbara to remove himself from the *St. David's* case. During a closed hearing on September 20, 1994, petitioner marked a transcript which she prepared of the portion of the radio program critical of Professor Barbara, and showed it to Judge Barbara in support of the motion. Judge Barbara became angry, said that the content of the exhibit pertained to his "personal life," and directed petitioner to withdraw the exhibit or risk contempt. The exhibit was immediately withdrawn.

On September 27, 1994, Judge Barbara filed an order directing petitioner to show cause why she should not be found in contempt. The matter was scheduled to be heard by Judge Barbara. Before the contempt charges proceeded to an evidentiary hearing, petitioner asked Judge Barbara to remove himself because of his personal role as a victim which would necessarily bias him. Judge Barbara declined to remove himself, and proceeded with the hearing.

At the close of the hearing Judge Barbara found petitioner in contempt. The punishment imposed included a fine of $500, half the court costs of the contempt proceedings, removal of petitioner from the *St. David's v. Westboro Baptist Church* case, and an order prohibiting petitioner from practicing in the local judicial district (Third Judicial District) until she paid the fine and costs. Immediately following a news story reciting this finding and punishment, the Kansas Disciplinary Administrator initiated an ethical complaint against petitioner, and petitioner's employer, a state agency, proposed a one-week suspension of petitioner without pay. Both of these disciplinary matters are still pending.

Petitioner appealed the finding of contempt, raising various points of error. During the appeal, the State's position was that

Judge Barbara was not biased, and that it was proper for him to hear the contempt charge. The State never alleged that it was harmless error for Judge Barbara to hear the case. Also, the State never assumed a burden of demonstrating beyond a reasonable doubt that the outcome of the contempt proceedings would have been the same if not tried by a biased judge.

The Kansas Court of Appeals issued an order on January 17, 1997, holding that it was error for Judge Barbara to hear the contempt charges because he was personally the victim, based on this Court's opinion in *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971). The court concluded, however, that it was harmless error for a biased judge to hear the contempt proceedings, stating: "Her conviction was overwhelmingly supported by the evidence, and the punishment imposed was very reasonable and well within the exercise of reasonable judicial discretion. Margie Phelps has failed to demonstrate prejudicial error."[2]

Petitioner filed a motion for rehearing with the Kansas Court of Appeals, which was denied without discussion on February 12, 1997. Petitioner filed a petition for review with the Kansas Supreme Court, which was also denied without discussion on March 19, 1997.

In her motion and petition, petitioner argued that as a

---

[2] In *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927), this Court rejected that same argument. There, the government argued that "the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore that he cannot complaint of a lack of due process, either in his conviction or in the amount of the judgment." This Court answered: "No matter what the evidence was against him, he had the right to have an impartial judge."

matter of law judicial bias is a fundamental and foundational error, and cannot be treated as harmless error, even if the record allegedly supports a finding of guilt. See *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 1588, 137 L.Ed.2d 906 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991); *Tumey v. Ohio, supra*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927). This rule of law is long established, and is based on the fact that judicial bias is pervasive, ungettable, and presumed to impact the outcome. The "constitutional floor" established by the Due Process Clause clearly requires a judge with no actual bias against the defendant or interest in the outcome of a particular case. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997).

The force of this rule is felt here, where it cannot be gainsaid that the bias of the judge who claimed personally to be the victim impacted the outcome of the proceedings. Particularly when a review of the record of the contempt proceedings reveals zero evidence to support Judge Barbara's conclusion that petitioner acted with a contemptuous motive.[3]

3

It is important to note briefly the dilemma an attorney would have in a situation of this kind. The purpose of marking the exhibit was to support a motion to recuse the judge. There is a pernicious unfairness in charging an attorney with being motivated to "intimidate" the judge into getting off the case. The motion was made was petitioner's fear that the sermon by the preacher of the church she represented had so angered the judge that he would be unable to hear the matter fairly. Particularly in light of his history of involving himself in the religious debate in the community at which the church was center. The only thing that converted these proper and statutorily-prescribed acts by petitioner into alleged contempt was a motive which respondent Barbara superimposed over petitioner's actions. No evidence was offered at the hearing other than petitioner's testimony as to her motive, which was uncontroverted by the State. Nothing in her testimony disclosed any motive other than to

Once the Kansas Court of Appeals recognized Judge Barbara's bias, and the fact that he should have recused himself, the *only* constitutionally permissible outcome was reversal. "Although most constitutional errors have been held amenable to harmless-error analysis . . . **some will always invalidate the conviction**, [including trial by a biased judge]." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); emphasis added.

Yet, even if the court had believed judicial bias could be harmless error, before finding that it was harmless in this case, the court was obligated to impose on the State a burden of showing that the outcome would have been the same. As the beneficiary of the error, the State should have assumed the burden of proving beyond a reasonable doubt that the error did not contribute to the outcome. *E.g., Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instead, without any notice, the court imposed on petitioner the burden of showing prejudice had occurred. In every particular, this ruling violated the constitutional principles announced by this Court.

This error by the Kansas Court of Appeals has utterly

---

protect a client in difficult circumstances.

Mr. Phelps has preached the same unvarnished message for over 51 years. It is not likely he will alter his course because of yet another round of litigation that flows from this ministry. The church believes her members' speech is lawful and protected, no matter how unpopular. If they were going to become tongue-tied because of litigation, they may as well stop the ministry now. This is the context in which petitioner was functioning when she attempted to represent her client by properly inquiring about whether Judge Barbara was biased. In the end, it was determined he was biased. The outcome of the contempt proceedings would *not* have been the same if an impartial judge had heard the matter.

evaded review, by both the state and federal courts. If the rule of law relied on by the federal district and appellate court is allowed to stand, a person in petitioner's place can *never* gain review of a serious constitutional violation which has dramatically impacted her professional life. This fact is the central issue raised by this petition.

On March 31, 1997, petitioner filed a petition for habeas relief in federal court. The State challenged jurisdiction, and on November 18, 1997, the district court entered an order finding that petitioner was not "in custody," and dismissed the petition. On December 23, 1997, the district court entered an order certifying for review by the Tenth Circuit Court of Appeals three issues, including the constitutional issue regarding judicial bias and the "in custody" issue. On October 7, 1998, the Tenth Circuit issued an order affirming dismissal, addressing only the "in custody" issue.

REASONS THE WRIT SHOULD ISSUE

A. IT IS A DENIAL OF EQUAL PROTECTION TO DENY ACCESS TO FEDERAL COURTS THROUGH HABEAS REVIEW FOR THOSE PERSONS WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED, SIMPLY BECAUSE THEY HAVE NOT BEEN IMPOSED JAIL TIME, WHILE THOSE WITH JAIL TIME IMPOSED ARE AFFORDED FULL REVIEW OF THEIR CONSTITUTIONAL ISSUES.

If a party can be denied access to federal court review of constitutional error which occurred in a criminal proceeding, simply because she was not imposed jail time, while a person with ten minutes of jail time can have full review, equal protection has

been denied.

Congress should not be able to place a restriction on the ability of an Article III court to review constitutional issues, particularly in the absence of any compelling or rational basis for doing so. *E.g., Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S.Ct. 1172, 1175, 35 L.Ed.2d 572 (1973); *United States v. Kras*, 409 U.S. 434, 446, 93 S.Ct. 631, 638, 34 L.Ed.2d 626 (1973). The Equal Protection Clause prohibits granting some persons access to courts, while denying that same access to others. *E.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984); *Meltzer v. C. Buck LeCraw & Company*, 402 U.S. 936, footnote 1, 91 S.Ct. 1624, footnote 1, 29 L.Ed.2d 130 (1971).

Refusal to entertain this petitioner's habeas lawsuit "gives rise to the substantial constitutional question posed by denial of access to the federal courts. Whether the Constitution permits Congress to forbid an Art. III court from reviewing constitutional challenge to administrative penalties is a question the Court has not addressed explicitly." *Jones v. United States*, 419 U.S. 907, 910, 95 S.Ct. 190, 192, 42 L.Ed.2d 150, Douglas, Justice, dissenting from denial of certiorari (1974). In *Jones*, a serviceman was denied habeas review because his sentence did not include incarceration. He sought to have constitutional challenges to his conviction reviewed by the federal court. "A determination of these claims by a federal court," Justice Douglas said, "is an indispensable safeguard of the constitutional rights of an accused . . . " 419 U.S., at 909; 95 S.Ct., at 191.

Jones was denied relief because he did not receive jail time. "The absence of confinement does not render the punishment trivial. Penalties not involving imprisonment – discharges, forfeitures, demotions – are frequently employed by military authorities, often with devastating effect upon the life and

livelihood of the affected serviceman." 419 U.S., at 910; 95 S.Ct., at 192-193. Quoting from *Kauffman v. Secretary of the Air Force*, 135 U.S.App.D.C. 1, 415 F.2d 991, 996 (1969), Justice Douglas continued:

> To hold that collateral review is contingent upon confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violations of the serviceman's rights.

Ibid.

Denying a United States citizen review by an Article III court of federal constitutional questions, as protection against an improper criminal conviction by the state, defeats the ultimate purpose for the formation and existence of federal courts. Indeed, a federal court that oversees and protects the federal constitutional rights of the citizenry is what distinguishes a group of states united into one nation from a group of states loosely associated. In other words, while the states have certain rights, at the same time by forming a union, we all agreed to be governed – and protected – by the federal Constitution, with the federal government providing the protection. The entire scheme of our constitutional form of government is defeated if one class of citizens – in this case those whose criminal penalty happens not to include jail time – can be deprived of that protection. That is precisely what has happened in this case. This petitioner has no place else to go for review or relief.

It has long been established that in a criminal matter the accused is entitled to an impartial fact finder. The failure to so provide amounts to foundational error, of the type that threatens to erode the entire criminal justice process. Under no circumstances has this Court permitted the government to let a

conviction stand which was given at the hands of a biased fact finder. Even if the evidence of guilt is enormous. That is because there is no manner of careful incision which can cut out the bias from the outcome.

This rule of law means *nothing* if a person who is the victim of its failure has no recourse to federal court. Further, to grant full review of the issue to a person who is punished by a jail term, while denying any review to a person whose punishment, no matter how devastating, happens not to include a jail term, is a denial of equal protection. There is no rational basis for such an outcome. The harm which federal courts protect against is the harm of denial of constitutional rights. That harm does not only result from jail time.

In this case, had petitioner been given a day in jail, that consequence would not have been nearly as severe as the one imposed instead. One day in jail could have been served, and been over with and done, without long term consequences. Instead, she was removed as lead counsel from a case with an important client who needed her.[4] She was also removed from practicing in the judicial district where she resides, pending payment of a substantial fine and half the court costs of a multi-day evidentiary hearing. She also had a cloud placed over her professional reputation, by a judge whom she has now demonstrated should not have been hearing the charge of

---

[4] The complexity of the constitutional issues raised in the case from which petitioner was removed can be seen in this Court's Case No. 96-582. By virtue of a statutorily-mandated stay pending appeal of the contempt finding, petitioner was able to present a petition for writ of certiorari to this Court in that matter. The Court required a response from St. David's, and then denied the writ.

contempt.[5] This impact on petitioner's professional reputation and activities is far more serious than the impact one day in jail would have had. The restraints on her liberty interest in her professional reputation and pursuits, *e.g., Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), was far greater than a sentence of one day in jail would have been on her physical liberty.

Further, there is no compelling or rational basis for a distinction between jail time and a fine. This Court rejected such a distinction as a basis for denying access to indigent persons to an appeal by a rule which provided transcripts in felony cases only in *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971). "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S., at 196; 92 S.Ct., at 416. Similarly, the unconstitutionality of a conviction rendered by a biased judge is no less unconstitutional by any difference in the sentence imposed.

> We add that even approaching the problem in the terms the city suggests hardly yields the answer the city tenders. The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an

---

[5] In addition to the ruling that Judge Barbara should not have heard the contempt charges, in the underlying case he was removed as well. The Kansas Court of Appeals stopped short of finding Judge Barbara should have removed himself from the underlying case, but directed that the case be reassigned upon remand, after that court reviewed a preliminary injunction. See *St. David's v. Westboro Baptist Church*, 22 Kan.App.2d 537, 921 P.2d 821 (1996).

> indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds . . .

Ibid. This Court has clearly stated that the nature of the punishment is not a justification for distinguishing between different groups of criminally accused for purposes of protecting constitutional rights. Thus, Congress has no compelling or rational basis for limiting review by Article III courts of constitutional issues in criminal proceedings merely by virtue of whether the accused is actually physically confined or not. (This issue is further compounded by the broad range of what lower courts count as "in custody.")

Resort to federal court review is the "first line of defense against constitutional violations," *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1997), and habeas petitions are of fundamental importance to our constitutional scheme of things. Thus, denial of access to federal courts for habeas review – when no other avenue is available as in this case – should be done only in the face of the most compelling governmental purpose. No valid governmental purpose can be discerned, when the distinction is based solely on the nature of the punishment imposed.

It is a denial of equal protection to deny access to federal courts for review of constitutional issues to those who have been found guilty in criminal proceedings who received punishment other than incarceration. If petitioner is not afforded access to federal court to present her constitutional claims, she has no place else to go.

B. IT WAS ERROR FOR THE FEDERAL COURTS TO FIND THAT PETITIONER WAS NOT "IN CUSTODY," GIVEN THE SIGNIFICANT RESTRAINTS ON HER LIBERTY, INCLUDING HER PROFESSIONAL LIBERTY.

This Court has made it clear that "in custody" means more than being placed in physical restraints. Recognizing that the writ has been extended "beyond that which the most literal reading of the statute might require," this Court has said that what a petitioner must show is that she "has suffered substantial restraints not shared by the public generally." *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510, 102 S.Ct. 3231, 3236-3237, 73 L.Ed.2d 928 (1982). "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S.Ct. 373, 376, 9 L.Ed.2d 285 (1962).

The federal appellate courts consistently hold that a fine or restitution – standing alone – is not an adequate basis for a finding that the petitioner is "in custody." *E.g.*, *Williamson v. Gregoire*, 151 F.3d 1180, 1183, (9th Cir. 1998), and cases cited there from the First, Second, Fifth, Sixth, Seventh and Ninth Circuits; *Duvallon v. Florida*, 691 F.2d 483 (11th Cir. 1982); *Russell v. City of Pierre, State of South Dakota*, 530 F.2d 791 (8th Cir. 1976); *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976).[6]

---

[6] The reasoning for not recognizing a fine or restitution as

Even so, this case is not a fine only case. Lower courts have granted habeas review in cases which did not involve incarceration or did not involve a fine or restitution only. In *Gornto v. McDougall*, 336 F.Supp. 1372 (S.D.Ga. 1972), the court found that where petitioner's twelve month sentence was suspended and she was fined $1,006.50, she was in constructive state custody and the court had jurisdiction to review her habeas claims. In *Richards v. Townsend*, 300 F.Supp. 529 (N.D.Calif. 1969), the court found that a sentence of probation was sufficient to place the petitioner "in custody" for habeas review.

Federal appellate courts have also found petitioners to be "in custody" in the absence of any incarceration. In *Barry v. Bergen County Probation Department*, 128 F.3d 152 (3d Cir. 1997), the court held that a sentence of 500 hours of community service rendered petitioner "in custody" for purposes of habeas relief. The community service was imposed in lieu of a fine of $85,000, and if petitioner failed to perform he would be fined, not imprisoned. The State argued this fact, plus petitioner's ability to choose the type of assignment and when he would perform the assignment, indicated petitioner was not "in custody." The Third Circuit said that was too narrow a reading, noting that this Court had held that "in custody" was no longer limited to physical custody. The impact on liberty was found in the fact that the state was exercising control over how the petitioner spent his time.

In *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993), the court held that a sentence which did not subject

---

placing the petitioner "in custody," is the distinction between a property and a liberty interest. As discussed above, this Court has noted that a punishment involving money, such as a fine or restitution, can be equally devastating. Further, in light of the equal protection violation raised herein, petitioner submits that this is a distinction that is not warranted by the history, purpose or precedent regarding the habeas writ.

petitioner to any incarceration, but instead included a $250 fine, a ninety-day suspension of his driver's license, and fourteen hours of attendance at an alcohol rehabilitation program, was sufficient to cause petitioner to be "in custody." The finding rested on the restraint on liberty arising from petitioner's forced attendance in the alcohol rehabilitation program.[7]

In an unpublished decision, the Fourth Circuit held that where petitioner was placed on probation after failing to pay fines and perform community service, the petitioner was "in custody." In that case, no jail time was ever imposed or suspended. *McClenny v. Murray*, 33 F.3d 52, 1994 WL 465851 (4th Cir. (Va., 1994)).

These cases reflect that the circuits are in conflict. By the reasoning used by the Third, Fourth and Ninth Circuits, petitioner is "in custody." She has specific restraints on her professional liberty, and on whether she can or not appear in specific courtrooms as counsel.

The conflict and confusion between the Circuits arises from a tendency by the lower courts to narrowly define "liberty," focusing still on physical restraint. But if physical restraint is not the only form of restraint that can be imposed on liberty, this narrow reading is unfounded. Further, the framers intended

---

7

The same Circuit ruled this year that a requirement that a convicted sex offender register under a state law was not sufficient to find petitioner was "in custody" for habeas review. In spite of the substantial impact of the registration requirements on the sex offender's daily existence, the Ninth Circuit distinguished these cases on the basis of the fact that the petitioner did not have to personally appear at the sheriff's office to register, since that could be done by mail. And the fact that "the law does not specify anyplace in Washington or anywhere else where Williamson may not go." *Williamson v. Gregoire, supra*, 151 F.3d 1180 (9th Cir. 1998).

liberty to be defined as broadly as life and the pursuit of happiness. Nothing justifies so narrow a reading of "liberty" when deciding whether restraints on liberty are significant enough to place a petitioner "in custody."

The only case cited by the Tenth Circuit in its holding was *Ginsberg v. Abrams*, 702 F.2d 48 (2d Cir. 1983). Ginsberg was convicted of perjury during testimony to a grand jury which was investigating his receipt of money while serving as a New York State Assemblyman. He was not removed from the bench, where he served as a family judge, or disbarred from practicing law, as part of his sentence. After he was indicted, he was suspended as a judge with pay. After his conviction he never returned to the bench because a state law had been passed which prohibited a person with a felony conviction from serving as a judge. *Ginsberg v. Purcell*, 51 N.Y.2d 272, 273, 414 N.E.2d 648, 649, 434 N.Y.S.2d 147, 148, *reversed*, 74 A.D.2d 561, 424 N.Y.S.2d 473 (1980). Also after his conviction he was subjected to disbarment, though later reinstated. *In the Matter of Ginsberg*, 106 A.D.2d 421, 483 N.Y.S.2d 645 (1984).

Thus, the restraints in *Ginsberg* which were offered to form "in custody" were all "collateral consequences" of the conviction, not part of the sentence itself. In this case, by contrast, petitioner's professional liberty was directly impaired and restrained as part of the sentence.[8] Thus, *Ginsberg* is not

---

[8] Petitioner recognizes that this Court treats "collateral consequences" different from the actual sentence imposed. *E.g.*, *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989); *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

The rule announced by the Court in these, and other, cases is that if a petitioner is "in custody" at the time his petition is filed, but

controlling and does not justify the outcome reached by the Tenth Circuit. Ironically, though the Tenth Circuit disregarded petitioner's citations to authorities regarding collateral consequences and mootness as not on point, the court relied exclusively on a "collateral consequences" case to deny petition relief.

Petitioner was imposed a sentence which placed significant restraints on her liberty, including whether she could freely come and go – in a specific case and in a judicial district – and including on her professional liberty. Petitioner's sentence involved significantly more than the substantial fine and court costs imposed. Existing precedents indicate that a significant restraint on liberty, even in the absence of any form of physical custody, is sufficient for a finding that the petitioner is "in custody." It was

---

later falls out of custody, so to speak, while the case is pending, *so long as* there are "collateral consequences" remaining, the claim is not moot and may be heard.

If the only way a federal court can have proper jurisdiction at the outset of a habeas action is by the petitioner being "in custody," it is a little puzzling that something *different* could provide jurisdiction at some later point in the case. Under the general mootness doctrine, in some manner the *original* dispute or controversy must still be alive. If the only controversy that can *originally* provide jurisdiction is being "in custody," how can something *different* satisfy later?

Given the purpose of habeas relief, and in light of petitioner's equal protection argument, petitioner urges here reconsideration of this distinction. If there are demonstrable (not merely speculative) "collateral consequences" flowing from a criminal conviction, petitioner respectfully urges the Court to adopt a rule of law which would permit that petitioner to have his constitutional issues reviewed. That is, if "collateral consequences" are demonstrated and significant, they should serve as the basis for a finding that the petitioner is "in custody."

error to dismiss petitioner's lawsuit for lack of jurisdiction.

CONCLUSION

This petition presents an important constitutional question, e.g., whether it is a violation of equal protection to allow persons sentenced to jail time to gain habeas review of constitutional issues, while denying that same access to those sentenced with something other than jail time. This petition also presents issues on which federal appellate courts are divided, concerning the scope of "in custody" in the absence of incarceration. This petition also presents a case where the Tenth Circuit has departed from an accepted course of judicial proceeding by denying review in a case presenting substantial restraints on liberty for the wrong reasons.

This case involves an unmitigated violation of petitioner's constitutional right to be tried by an unbiased judge. Petitioner should have been afforded review of the constitutional issues raised by her petition. Given the nature of the punishment imposed, including significant liberty restraints, past precedents of this Court indicate that petitioner has satisfied the "in custody" requirement for habeas review.

Petitioner asked Judge Barbara not to hear this matter over four years ago. It took her nearly two and a half years to gain a ruling that Judge Barbara should not have heard the contempt charges. That finding was meaningless, however, in light of the Kansas Court of Appeals' ruling that the error of allowing a biased judge to hear a criminal contempt case was harmless. This is a fundamental constitutional error on the part of the state court.

Since the state court issued its ruling, petitioner has been

unable to secure review of the constitutional issue. This failure has been premised upon the notion that her penalty is comparable to a fine-only case, which is not supported in the record; and/or that her penalty is not serious enough to warrant habeas review, which is not supported in the record; and/or that in the absence of incarceration she is not eligible for habeas review. Yet other Circuits have afforded habeas review in cases where no incarceration was imposed, illustrating that the federal appellate courts are not in agreement on what constitutes "in custody," particularly in cases not involving incarceration.

It is a violation of equal protection to afford some persons access to federal courts to review constitutional issues arising out of criminal proceedings, while denying that access to others. Congress does not have the authority to limit the federal court's review of constitutional issues, particularly in the absence of any rational or compelling basis for doing so.

This Court has recognized that physical custody is not a requirement for habeas review. This Court has also recognized that the imposition of a fine, or other non-incarceration penalties, can be as burdensome as incarceration. There is no rational basis for distinguishing between cases that involve fines or other forms of punishment and cases that involve incarceration.

Past decisions of this Court suggest that any restraint on liberty is adequate to satisfy the "in custody" requirement for habeas review. Petitioner here was sentenced to more than a fine, including being removed from an important and complex constitutional case where she was lead counsel, and being disbarred from her home judicial district until she pays the fine or court costs. Further, the "collateral consequences" to this conviction are serious, and should themselves be considered as part of the basis for finding that petitioner is "in custody."

Petitioner should not be subjected to all of the serious

penalties that flowed from her conviction for criminal contempt, in light of the finding by the Kansas Court of Appeals that Judge Barbara was biased and should not have heard the case. As a matter of fact and law, the outcome would not have been a finding of guilt had petitioner been tried by an impartial judge. Petitioner is entitled to review of this issue, and to have relief from the defective conviction.

Respectfully submitted,

Chris R. Davis
Counsel of Record
PHELPS-CHARTERED
1414 S.W. Topeka Blvd.
P.O. Box 1886
Topeka, Kansas 66601-1886
(785) 233-4162